STATE OF MICHIGAN

COURT OF APPEALS

OLD REPUBLIC NATIONAL TITLE HOLDING CO and OLD REPUBLIC NATIONAL TITLE INSURANCE CO,

Plaintiffs-Appellants,

v

FIRST METROPOLITAN TITLE CO, METROPOLITAN TITLE-WISCONSIN, LLC, and KENNETH LINGENFELTER,

Defendants-Appellees.

UNPUBLISHED
March 23, 2010

No. 284767
Livingston Circuit Court
LC No. 06-022314-CB

OLD REPUBLIC NATIONAL TITLE HOLDING CO and OLD REPUBLIC NATIONAL TITLE INSURANCE CO,

Plaintiffs-Appellants,

v

FIRST METROPOLITAN TITLE CO, METROPOLITAN TITLE-WISCONSIN, LLC, and KENNETH LINGENFELTER,

Defendants-Appellees.

No. 286399
Livingston Circuit Court
LC No. 06-022314-CB

Before: K. F. KELLY, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

This consolidated appeal arises out of a contract dispute. In Docket No. 284767, plaintiffs Old Republic National Title Holding Co. and Old Republic National Title Insurance Co. (collectively, "Old Republic") appeal as of right the trial court's order granting defendants First Metropolitan Title Co., Metropolitan Title-Wisconsin, L.L.C., and Kenneth Lingenfelter summary disposition. In Docket No. 286399, Old Republic appeals the trial court's order granting appellate attorney fees and costs to defendants. We affirm in part, reverse in part, and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE PARTIES

- Plaintiff Old Republic Holding, a Delaware corporation, is a holding company for various entities engaged in the title insurance business.

- Plaintiff Old Republic Insurance is a Minnesota-based, national title insurance underwriter. Old Republic Insurance is a wholly owned subsidiary of Old Republic Holding.

- Defendant First Metropolitan is a Michigan-based title insurance agency. Until December 2003, First Metropolitan was an independent agent conducting business through various affiliates.

- Defendant Ken Lingenfelter is the founder of First Metropolitan. Lingenfelter was the principal owner and manager of First Metropolitan until December 2003. Lingenfelter was also the principal owner of an affiliate company, MTC-1, until December 2003. In December 2003, Lingenfelter sold First Metropolitan and its affiliates, including MTC-1, to First American Title Insurance Company. First American Title now wholly owns First Metropolitan.

- Defendant Metropolitan Title is a Michigan limited liability company that operates an insurance agency in Wisconsin. Lingenfelter, through MTC-1, and Old Republic Holding jointly formed Metropolitan Title in May 2001. At the time, MTC-1 was the majority member and Old Republic Holding was the minority member. However, in 2004, MTC-1 was merged into First Metropolitan. As a result, First Metropolitan currently owns the majority interest in Metropolitan Title, while Old Republic Holding still holds the minority interest.

B. THE CONTRACT

When Lingenfelter and Old Republic Holding formed Metropolitan Title in May 2001, Old Republic and Lingenfelter both contributed existing title insurance agencies to Metropolitan Title. Old Republic contributed two of its existing Wisconsin agencies, one in Madison and the other in Milwaukee. Lingenfelter, through MTC-1, acquired the assets of All American Land Services, an independent title agency in Wisconsin, and contributed its assets to Metropolitan Title. Old Republic Holding received a one-third interest in Metropolitan Title and the contract right to underwrite 80 percent of the title insurance that Metropolitan Title issued. Specifically, the parties agreed as follows:

> As long as Ken Lingenfelter, Agent or any of Agent's affiliates and Insurer are member/owners of Metropolitan Title Wisconsin-L.L.C., a licensed title insurance agent operating in the state of Wisconsin and as long as Old Republic National Title Holding Company, an affiliate of insurer, is obligated under a certain "take out guarantee" by and between All American Land Services, Inc., MTC-1 and Old Republic National Title Holding Company dated May 1, 2001, agent shall issue title insurance products for and underwritten by the Insurer

> equal to no less than 80% of Agent's total title insurance business for said territory as defined above that is not referred by another underwriter. The 80% title insurance requirement will be subject to annual review by the Executive Officers of both the Agent and Insurer.

The parties defined "agent" as First Metropolitan and "insurer" as Old Republic Insurance.

The parties' relationship continued without incident until December 2003, when Lingenfelter sold First Metropolitan and its affiliates, including MTC-1, to First American Title, one of Old Republic's direct competitors. After the sale, Metropolitan Title's referrals to Old Republic decreased.

C. Procedural History

In August 2006, Old Republic filed a complaint against defendants. In count I, Old Republic Holding alleged minority member oppression for defendants having "effectively frozen" Old Republic Holding out of the affairs of Metropolitan Title by not complying with the 80 percent referral provision. And in count II, Old Republic Insurance alleged breach of contract for defendants' failure to comply with the 80 percent referral provision.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that they had no liability under their interpretation of the 80 percent provision. Old Republic responded, arguing that, under their interpretation of the clear language of the provision, defendants were liable.

The trial court concluded that the only permissible interpretation of the 80 percent provision was that the contract only required Metropolitan Title to abide by the 80 percent provision as long as Lingenfelter, First Metropolitan or its affiliates, and Old Republic Insurance were all member/owners of Metropolitan Title. Specifically, the trial court explained:

> I do not find that it's ambiguous . . .. [T]he clear meaning of the language and [sic] controversy is as long as one, Ken Lingenfelter; two, agent or any of agent's affiliates and three, and insurer, are members of the entity, the LLC, a licensed insurance agent operating in the state of Wisconsin, and as long as Old Republic Holding is obligated under a certain take out guarantee, then the 80 percent arrangement shall apply . . .. And to suggest that it's ambiguous is not persuasive to me at all.

The trial court granted summary disposition in defendants' favor on Old Republic Insurance's breach of contract claim, and without any discussion or analysis, dismissed Old Republic Holding's minority member oppression claim as well.

Old Republic now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Although defendants raised MCR 2.116(C)(8) and (10) in their motion for summary disposition, the trial court decided the motion based on the plain language of the contract; thus, we consider the court's ruling as having been granted under MCR 2.116(C)(8).

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. All factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party.[1] Under this motion, the legal basis of the complaint is tested by the pleadings alone.[2] "In a contract-based action, however, the contract attached to the pleading is considered part of the pleading."[3] The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.[4] But "[i]n response to a motion for summary disposition in an action for breach of contract, a trial court may determine the meaning of the contract only when the terms are not ambiguous. If the terms are subject to two or more reasonable interpretations, a factual development is necessary to determine the intent of the parties and summary disposition is inappropriate."[5] This Court reviews de novo both a trial court's ruling on a motion for summary disposition[6] and questions of contract interpretation, including determination whether contract language is ambiguous.[7]

B. THE 80 PERCENT PROVISION

Old Republic argues that the trial court erred by changing the terms of the parties' contract and then holding that its reading was the only reasonable interpretation. According to Old Republic, the trial court's interpretation was clearly against the contract's plain language. Defendants counter that the trial court properly interpreted the unambiguous contract language as written.

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[1] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[2] *Id*.

[3] MCR 2.113(F); *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[4] *Maiden*, 461 Mich at 119.

[5] *SSC Assocs Ltd Partnership v General Retirement Sys*, 192 Mich App 360, 363; 480 NW2d 275 (1991); see also *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003) (stating that interpretation of an ambiguous contract is a question of fact that must be decided by a jury).

[6] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[7] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining what the parties' agreement is, and enforcing it.[8] Absent ambiguity, a court must construe a contract to adhere to its plain and ordinary meaning.[9] A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other.[10] We are to avoid technical and constrained constructions.[11]

The parties contract states as follows: "As long as Ken Lingenfelter, Agent or any of Agent's affiliates and Insurer are member/owners of Metropolitan Title . . .." Old Republic argues that this language clearly required Metropolitan Title to refer 80 percent of its underwriting to Old Republic as long as (1) Lingenfelter *or* First Metropolitan *or* any of First Metropolitan's affiliates, *and* (2) Old Republic Insurance were member/owners of Metropolitan Title.[12] That is, under Old Republic's reading, the first three entities—Lingenfelter, First Metropolitan, or any of First Metropolitan's affiliates—are a group joined by the disjunctive "or." The additional entity, Old Republic Insurance, is then added by use of the conjunctive "and."

But the trial court found that the contract only required Metropolitan Title to abide by the 80 percent provision as long as (1) Lingenfelter, *and* (2) First Metropolitan or any of First Metropolitan's affiliates, *and* (3) Insurer were member/owners. Thus, Old Republic argues that the trial court erred by inserting an extra "and" and an extra comma into the clause that created an additional requirement that Lingenfelter be a member/owner for the clause. In other words, according to Old Republic, the trial court's interpretation effectively rewrote the contract as if it said: "As long as Ken Lingenfelter, **and** Agent or any of Agent's affiliates**,** and Insurer are member/owners of Metropolitan Title . . .." Defendants contend that the trial court correctly interpreted the provision.

Both parties argue that their interpretation of the 80 percent provision is clear. However, we conclude that the only thing that is clear about the 80 percent provision is that it is unclear. The words of the provision may reasonably be understood in two different ways: one way that would require Lingenfelter *and* Agent or any of Agent's affiliates to be members, and the other requiring only Lingenfelter *or* Agent or any of Agent's affiliates to be members. Under either interpretation, the "Insurer" must also be a member. (Defendants argue that the "Insurer" requirement was never met because Old Republic *Holding*, not Old Republic *Insurance*, was the

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[8] *Detroit Trust Co v Howenstein*, 273 Mich 309, 131; 262 NW 920 (1935); *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991). *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186 (contracts are to be interpreted and their legal effects determined as a whole).

[9] *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

[10] *Klapp*, 468 Mich at 467.

[11] *Bianchi v Auto Club of Michigan*, 437 Mich 65, 71, n 1; 467 NW2d 17 (1991).

[12] Recall that "agent" is First Metropolitan and "insurer" is Old Republic Insurance.

member throughout the parties' relationship; however, this issue may also be resolved on remand.)

Defendants point out that an ambiguity in a contract should be construed most strongly against the drafter.[13] But the Michigan Supreme Court has recently clarified that "this rule is *only* to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean."[14]

Accordingly, we conclude that the trial court erred in concluding that the 80 percent provision was unambiguous, and we remand this issue for a factual determination of the parties' intended meaning.

C. MINORITY MEMBER OPPRESSION

Old Republic argues that because the trial court dismissed Old Republic Holding's claim for minority member oppression without discussion of analysis, there is no record from which this Court can discern the trial court's reasoning. Accordingly, Old Republic argues that this Court should reverse and remand this issue to the trial court for further review. We agree that the issue need be remanded.

Old Republic argues that defendants engaged in minority member oppression by breaching the 80 percent provision. However, as concluded above, because of its ambiguity, there is a question of fact whether defendants breached the 80 percent provision. Thus, resolution of this issue we reserve until a fact-finder determines the proper interpretation of the 80 percent provision on remand.

III. MOTION TO DISQUALIFY COUNSEL

A. STANDARD OF REVIEW

Before defendants moved for summary disposition on the issues discussed above, Old Republic brought its own motion to disqualify defendants' counsel based on conflict of interest. Old Republic now argues that the trial court erred in denying its motion to disqualify defendants' counsel when, without a waiver, defendants' counsel drafted and filed a pleading on Old Republic's behalf in Wisconsin while this litigation was pending and then used the exact same pleading against Old Republic in this cause of action.

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[13] See *Stark v Kent Products Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975).

[14] *Klapp*, 468 Mich at 471 (emphasis added).

Determination of the existence of a conflict of interest is a fact question that this Court reviews under the clearly erroneous standard.[15] But this Court reviews de novo "application of 'ethical norms' to a decision whether to disqualify counsel[.]"[16]

B. Factual Background

Attorney Elizabeth J. Fossel and her firm Varnum, Riddering, Schmidt & Howlett, L.L.P. is, and has been throughout these proceedings, defendants' attorney in this case. However, while the present case was pending, Old Republic Holding and First Metropolitan were jointly sued in Wisconsin. Because of an indemnification clause in the parties' agreement, First Metropolitan was required to indemnify and defend Old Republic Holding. Thus, First Metropolitan, through Fossel and Varnum, agreed to provide a defense to Old Republic, which ultimately included preparing and arranging for the filing of an answer and affirmative defenses on behalf of both First Metropolitan and Old Republic in the Wisconsin case.

According to Old Republic, Varnum later told Old Republic that Varnum intended to use the same answer and affirmative defenses prepared *for* Old Republic in the Wisconsin action *against* Old Republic in this case. More specifically, in the Wisconsin case's answer and affirmative defenses, Varnum had alleged that First Metropolitan had paid off a note owed to Old Republic. Then, according to Old Republic, during case evaluation in *this* case, Fossel relied on the Wisconsin case's answer and affirmative defenses as admissions in this case to argue that the note payment cut off First Metropolitan's liability to Old Republic. (On this point, defendants point out that the allegations about what was said during case evaluations are inadmissible evidence.)[17]

Claiming conflict of interest, Old Republic requested that Varnum withdraw from representing defendants in this case. But Varnum refused, contending that it had never actually represented Old Republic in the Wisconsin action, noting that it had referred the case to local counsel in Wisconsin. Old Republic then formally moved to disqualify Varnum as defendants' counsel in this case. Defendants responded, arguing that Varnum's "limited scope accommodation," where it merely assisted in the Wisconsin case, was not a sufficient ground on which to support a claim of conflict of interest. Defendants also argued that it was unreasonable and untimely for Old Republic to request a disqualification eight months after the alleged conflict occurred.

After hearing oral argument on the motion, the trial court denied the motion to disqualify. The trial court reasoned that both parties "had full awareness of the particular problem" and that "[t]his was an attempt to accommodate the parties and get an answer filed." Thus, the trial court concluded that "there was a waiver in this case" and that neither party was prejudiced.

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[15] *Rymal v Baergen*, 262 Mich App 274, 316; 686 NW2d 241 (2004).

[16] *Id*. at 317.

[17] MCR 2.403(J)(4) ("Statements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding.").

C. ANALYSIS

"'It is a well-established ethical principle that "an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute."'"[18] Specifically, MRPC 1.7(a) and MRPC 1.9 prohibit the representation of a client where that representation is directly or materially adverse to another client or former client. "'The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.'"[19]

Like the trial court, we find it most significant that both parties "had full awareness" of the potential conflict of interest, and we agree with the trial court that there was a waiver in this case.

Old Republic filed suit in this matter against First Metropolitan in August 2006. And with full knowledge of the pendency of this action, after receiving service of the complaint in the Wisconsin case in January 2007, Old Republic's counsel "made an unqualified tender of the Old Republic's defense . . . to First Metro without any reservations to [Varnum] as counsel for First Metro." Old Republic's counsel averred that "[a]t the time of tender, [she] expected and believed that [Varnum] would be representing Old Republic in the Wisconsin action." Old Republic's counsel also admitted that she was invited to comment on drafts of the answer and affirmative defenses prepared in the Wisconsin case prior to their filing.

Shortly after agreeing to tender the defense to Old Republic, Varnum then sent a letter to Old Republic's counsel, acknowledging that Old Republic and First Metropolitan were actually adverse parties in this case and explaining, "that technically makes us adverse and causes a problem if we file in Wisconsin of behalf of" Old Republic. Varnum suggested that a mutual waiver be obtained from Old Republic and First Metropolitan "of any conflict or potential conflict arising out [sic] these rather unique circumstances." Varnum also stated that it had been in contact with local Wisconsin counsel, Michael Huitink, "to file our pleadings . . . so that the matter can proceed in a timely fashion."

Varnum did not move forward on obtaining the waiver, instead proceeding to prepare the answer and affirmative defenses on behalf of both parties. Huitink then actually filed the pleading, which identified him as attorney for First Metropolitan and Old Republic, and identified Varnum as co-counsel. After the pleading was filed, Varnum then sent an email to Huitink, directing him to contact Old Republic's counsel regarding obtaining a conflict waiver. In an email that Old Republic's counsel then sent to Huitink, Old Republic's counsel explained that Fossel had "assured" her that "conflict was the only issue and that First Metropolitan would fully indemnify Old Republic including for your attorneys' fees and costs." According to Old Republic's counsel, she and Fossel had "discussed the fact that, your engagement letter to Old Republic ought to indicate that you will be sending your invoices to First Metropolitan pursuant

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[18] *Killingbeck v Killingbeck*, 269 Mich App 132, 148; 711 NW2d 759 (2005) (citations omitted).

[19] *Rymal*, 262 Mich App at 319 (citations omitted).

to the indemnification agreement. That way, *although Old Republic will be your firm's client in the litigation*, as long as First Metropolitan is paying, there shouldn't be an issue."[20] The next day, Huitink sent an engagement letter to Old Republic's counsel, confirming its representation of Old Republic and stating, "As I understand it, . . . First Metropolitan Title Company will be indemnifying Old Republic National Title Holding Company and paying it attorneys' fees and costs in connection with this matter. To that end, I will be sending all bills to Ms. Fossel's attention for payment."

We conclude that Old Republic may not seek disqualification of Varnum in this case when it specifically requested that Varnum tender its defense in the Wisconsin case with full knowledge that Varnum was also serving as opposing counsel in this case. Any potential conflicts were apparent and acknowledged by the parties. Further, Old Republic's counsel was aware of the contents of the answer and affirmative defenses before filing and did not raise any objections. If Old Republic's counsel took issue with the allegation regarding First Metropolitan having paid off a note owed to Old Republic, then she had opportunity to object, especially when she knew First Metropolitan and Old Republic were adversarial parties in this case.

Moreover, Varnum's initial, limited assistance in the Wisconsin case was not a sufficient ground for disqualification. While the record demonstrates that Varnum assisted in preparation of the answer and affirmative defenses, the responsibility for filing the pleading and any subsequent representation was clearly handled by Huitink, and Old Republic expressed no objection. Accordingly, we cannot conclude that the trial court clearly erred in finding that no conflict of interest arose.

IV. APPELLATE ATTORNEY FEES AND COSTS

A. STANDARD OF REVIEW

Old Republic argues that the trial court erred in awarding appellate attorney fees and costs to defendants contrary to the Michigan Supreme Court's holding that appellate attorney fees and costs are not recoverable as case evaluation sanctions.[21]

This Court reviews de novo the proper construction and interpretation of court rules.[22]

B. FACTUAL BACKGROUND

Following the trial court's denial of Old Republic's motion to disqualify defendants' counsel, Old Republic sought leave to appeal from this Court. This Court ultimately denied the

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[20] Emphasis added.

[21] *Haliw v City of Sterling Heights*, 471 Mich 700, 711; 691 NW2d 753 (2005).

[22] *Id*. at 704.

request.[23] After the trial court granted summary disposition in defendants' favor, defendants moved to recover case evaluation sanctions, including appellate attorney fees and costs for an alleged 100 hours that defendants' attorney spent in responding to Old Republic's application for appeal. In doing so, defendants acknowledged that the Michigan Supreme Court had held that appellate attorney fees and costs are not recoverable as case evaluation sanction; however, defendants argued that case only dealt with post-trial appellate fees and that they should still be able to recover interlocutory appellate attorney fees.

After hearing oral arguments on the motion, the trial court agreed with defendants, ruling as follows:

> [T]he Court will make the distinction as argued by Ms. Fossel. It seems to me that as stated in the opinion and argued by her, that particular rule is trial oriented. And it seems to me that . . . the interim appeal, the interlocutory appeal, was in fact a trial tactic. It was—I understand the distinction here and the argument that says that it should not be included because it's a [sic] appeal from what it termed a correct or rather an incorrect decision, but I rest on the idea that *Haliw* and even the *Harris* case I believe involved dispositive motions also, and that was not so here. I look at the fact that, . . . the demand was that a certain claim or defense be dropped, and I think when we put it all together it smacks of trial tactic.

C. ANALYSIS

In *Haliw v City of Sterling Heights*, the Michigan Supreme Court held that "appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O)."[24] In so holding, the Court noted that "Michigan follows the 'American rule' with respect to the payment of attorney fees and costs."[25] And, under that rule, attorney fees and costs are generally not recoverable in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.[26] The Court explained that because the case evaluation sanctions rule[27] expressly authorizes recovery of "a reasonable attorney fee" and "costs," but does not expressly authorize appellate attorney fees and costs, the American rule precludes courts from reading the award of appellate fees and costs into the court rule.[28]

Despite the clear holding of *Haliw* that appellate attorney fees and costs are not recoverable as case evaluation sanctions, defendants nevertheless find significant the Court's

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[23] *Old Republic Nat'l Title Holding Co v First Metropolitan Title Co*, unpublished order of the Court of Appeals, entered January 4, 2008 (Docket No. 282357).

[24] *Haliw*, 471 Mich at 711.

[25] *Id*. at 706.

[26] *Id*. at 707.

[27] MCR 2.403(O)(6).

[28] *Haliw*, 471 Mich at 707.

statement that MCR 2.403(O) is "trial-oriented"[29] and attempt to distinguish this case where the fees they sought stemmed from an interlocutory, rather than a post-trial, appeal. We see no such distinction. The rationale in *Haliw* undermines defendants' contention that a court may award sanctions when interlocutory appellate relief is sought. As explained in *Haliw*, the American rule governing payment of attorney fees permits recovery of fees and costs *only* when expressly authorized. MCR 2.403 does not expressly authorize the recovery of *any* appellate attorney fees and costs—be they post-trial or interlocutory. Therefore, interlocutory appellate fees and costs are not recoverable as sanctions under MCR 2.403. Accordingly, we conclude that the trial court erred in allowing defendants to recover appellate attorney fees and costs.

We affirm the trial court's decision denying Old Republic's motion to disqualify defendants' counsel. However, we vacate the trial court's award of appellate attorney fees and costs to defendants, we reverse the trial court's decision granting summary disposition in favor of defendants, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ William C. Whitbeck

[29] *Id.*